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IN THE

Supreme Court of the United States

No. 779, OCTOBER TERM, 1966

JAMES F. SHORT, STATE DEPARTMENT OF AGRICULTURE OF THE STATE OF OREGON, MARK O. HATFIELD and ROBERT Y. THORNTON,

Appellants,

v.

NESS PRODUCE CO., an Oregon Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

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Appellants,

v.

NESS PRODUCE CO., an Oregon Corporation,

Appellee.

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the questions are so unsubstantial as not to warrant plenary consideration by this Court.

Statute Involved

The Oregon Legislature, at its regular 1965 session, enacted Chapter 150, Oregon Laws 1965, [Oregon Revised Statutes 619.910 and 619.990(8)], the labeling and signposting statute contested herein. Chapter 150 was approved by the Governor on April 8, 1965. It is attached hereto as Appendix A.

In accordance with Section 4 of the said statute, the Oregon Department of Agriculture promulgated regulations designated as Administrative Order AD 801 (8-65), which are attached hereto as Appendix B.

Statement of the Case

This is a direct appeal, pursuant to 28 U.S.C. 1253, from a final judgment entered on July 25, 1966, by a three-judge United States District Court for the District of Oregon constituted in accordance with 28 U.S.C. 2281. The said judgment declared unconstitutional, and permanently enjoined from enforcement, Chapter 150, Oregon Laws 1965, along with all rules and regulations promulgated thereunder.

Ness Produce Co., appellee herein, is an Oregon Corporation engaged in the business of importing and distributing frozen, boned, lean beef in the Portland, Oregon area. This frozen meat is imported in 60-pound cartons, primarily from Australia, and is sold to meat processors as commercial-grade lean beef. It is virtually identical to the corresponding grade of domestic manufacturing beef which is raised, slaughtered, hard-frozen, packed and stored within the United States. Frozen commercial-grade lean beef, whether imported or domestic, remains in a hard-frozen condition from the time of slaughter and packaging until use by the processor, who is the ultimate purchaser.

The meat imported by appellee is healthful, wholesome, fit for human consumption, and neither organically nor qualitatively different from domestic meat of similar grade.

All meat imported by appellee is subjected to rigorous testing for cleanliness and purity by veterinarians at the point of origin.[1] All such meat must be clearly marked

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[1] Foreign meat inspection procedures and standards of cleanliness, wholesomeness and grading are approved by the United States Department of Agriculture, and periodically checked for continued high standards by on-the-spot visitation.

with the country of origin under 19 U.S.C. 1304. Upon arrival in the United States, and prior to clearance for domestic consumption, all such meat must be again inspected and passed for purity and proper labeling under applicable Federal statutes and regulations. 19 U.S.C. 1306(b); 21 U.S.C. 71 *et seq.* ("Meat Inspection Act") and 9 CFR § 327 *et seq.* When such meat is used for production at an inspected plant in the United States, the imported meat and the products manufactured therefrom are once again inspected by United States Department of Agriculture officials, prior to sale.

In August, 1965, as a result of disruption of its business caused by enactment of said law, Ness filed suit in the United States District Court of Oregon, to enjoin enforcement of the statute. A preliminary injunction was issued on August 20, 1965. Thereafter, Ness was able to resume sales of imported meat to many of its traditional customers who had rejected offers of sale as a result of the passage of the said Chapter 150.

On July 25, 1966 the District Court below held that Chapter 150, Oregon Laws 1965, unreasonably discriminated against imported meat in violation of the Commerce Clause of the United States Constitution. The Court found that the purpose of the law was to burden and make difficult the sale of imported meat and that the substantial costs of labeling and record-keeping imposed by the Act on sellers of imported meat had an obvious and direct impact on interstate commerce.

Argument

The decision of the District Court is correct and should be affirmed. It is in complete accord and conformity with the long-continued, consistent and clear rulings of this Court. It is also in accord with the decision of another

Three-Judge District Court which passed on a comparable statute enacted by the State of Tennessee.[2]

The Oregon statute which was challenged in the Court below does not relate to the quality or condition of the product, but only to its place of origin. Appellant concedes that the meat imported by Ness is wholesome, and is neither organically nor qualitatively different from domestic meat. The statute results in substantial costs of labeling, sign-posting and bookkeeping to sellers of imported meat and products produced in whole or part therefrom. No such requirements are imposed upon persons who process or sell only domestic meat. It follows that the said statute constitutes a clear burden on interstate and foreign commerce, without even colorable justification as a valid exercise of state police power. As such, it contravenes Article I, Section 8 of the Constitution of the United States.

This Court has repeatedly held that a state cannot place itself in a position of economic insulation from outside competition through laws enacted under the guise of police power. *Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U. S. 361, 84 S. Ct. 378 (1964); *Hostetter* v. *Idlewild Bon Voyage Liquor Corporation,* 377 U. S. 324, 84 S. Ct. 1293 (1964); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520, 79 S. Ct. 962 (1959); *Dean Milk Co.* v. *City of Madison,* 340 U. S. 349, 71 S. Ct. 295 (1951); *H. P. Hood & Sons* v. *Du Mond,* 336 U. S. 525, 69 S. Ct. 657 (1949); *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 55 S. Ct. 497 (1935); *Brown* v. *Maryland,* 12 Wheat. 419 (1827).

The District Court found as a fact that the legislative history of the statute here in issue shows that it was

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[2] Chapter Nos. 34 and 367, 1965 Public Acts of Tennessee (appended to appellants' Jurisdictional Statement) requiring labeling, sign-posting and licensing. These statutes were declared unconstitutional by the United States District Court for the Middle District of Tennessee, Nashville Division, on March 1, 1966 in *The Tupman Thurlow Co., Inc., et al.* v. *W. F. Moss, Commissioner, etc., et al.,* 252 F. Supp. 641 (1966). The United States appeared at the trial and filed a brief *amicus curiae* in support of claim of unconstitutionality.

designed primarily to provide economic protection against a growing volume of beef imports. In the official committee report on the bill, the principal sponsor in the Oregon Legislature stated, in explanation of its purpose, that the proposal was designed to inform consumers that foreign meat was frozen and was "economic in nature because of the increase in the importation of foreign meat from 144½ million pounds in 1960 to 517 million pounds in 1963."[2] As found by the Court below, the statute reflects the draftsman's purpose, for it operates primarily, if not exclusively, to burden and make difficult the sale of imported meat.

It should be noted here that the quantity of imported beef which may be brought into the United States is regulated and controlled by quotas provided by Public Law 88-482, 88th Congress, effective August 22, 1964, 78 Stat. 594.

The decision of the court below striking down Oregon Chapter 150 is in complete conformity with the action taken by other Federal Courts when similar statutes have been placed in issue. In addition to the statute at bar, three similar laws have been the subject of litigation in Federal District Courts constituted pursuant to 28 U.S.C. 2281. In March, 1965, Tennessee labeling and licensing statutes were declared unconstitutional and permanently enjoined; *The Tupman Thurlow Co., Inc.* v. *W. F. Moss, supra.* A similar Iowa statute is presently before the District Court for final ruling, a preliminary injunction having been issued effective October 31, 1965; *International Packers Ltd.* v. *Harold A. Hughes, et al.*, So. District of Iowa, Central Division, Civil No. 6-1724-C-L. Nebraska's imported meat labeling law resulted in the issuance of criminal informations against a national processor and distributor of food products containing imported meats. Application of this statute was enjoined by preliminary order issued June 8, 1966 and is pending final

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[2] Oregon House Agriculture Committee Report on H.B. 1797, March 9, 1965.

disposition; *Armour & Co.* v. *State of Nebraska, et al.*, District Court for the District of Nebraska, Civil No. 1076L.[4]

In the "Questions Presented" section of their Jurisdictional Statement, appellants ask this Court to decide whether the validity of the statute in this case is controlled by the doctrine of *Baldwin* v. *G. A. F. Seelig, Inc., supra,* or that of *Savage* v. *Jones,* 225 U. S. 501, 32 S. Ct. 715 (1912). Appellee submits that these two cases stand for the same doctrine, both are correct, and both support the District Court Decision.

Baldwin invalidated a state statute in its application to sales within the state of certain products from without the state which had been purchased for less than the prescribed minimum price invoked by the state. The decision was based in major part on the principle that:

> ". . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the nobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. . . . The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended." 294 U. S. 511, 527.

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[4] The State Court decision in *Pacific Meat Co.* v. *Otagaki,* 394 P. 2d 618 (1964), cited by appellant, can hardly prevail in the face of these uniform holdings of Federal Courts. It is also worthy of note that the *Pacific Meat Co.* case involved a statute which applied to products which were not further processed prior to sale at retail, and applied to the products equally whether they were of domestic or foreign origin.

In *Savage* v. *Jones, supra,* this Court sustained the validity of an Indiana law which prohibited sales of certain animal feed stuffs unless sellers complied with requirements of inspection and analysis, disclosure of ingredients, and incidental provisions for registration and labeling. This statute was found to be non-discriminatory in nature. It was a clearly valid exercise of police power since it prevented fraud and related directly to the composition and nutrative values of the products. It applied to all sellers of commercial feeding stuffs.

Virtually every other case cited by appellants fails the test of relevance to the issues raised by their appeal. In *F.T.C.* v. *Algoma Lumber Co.,* 291 U. S. 67, 54 S. Ct. 315 (1934), this Court passed on the question of affirmative misrepresentation and misleading product descriptions prohibited by § 5 of the Federal Trade Commission Act, 38 Stat. at L. 717, 719. *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 32 S. Ct. 784 (1912), held there was no unconstitutional regulation of Interstate Commerce where Iowa adulteration and misbranding law to protect against unknown diluents applied to imports in original packages. In *Hutchinson Ice Cream Company, et al.* v. *Iowa,* 242 U. S. 153, 37 S. Ct. 28 (1916), this Court sustained a state statute prohibiting sale of all ice cream when containing less than a fixed percentage of butter fat where percentages were found to be reasonable. In *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 36 S. Ct. 440 (1916), a state weights and measures law governing retail sales of lard was affirmed as proper exercise of state police power to secure for its residents pure foods and honest weights. *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440, 80 S. Ct. 813 (1960), dealt with the constitutionality of a city code to protect its citizens against air pollution, sustaining the code as a proper exercise of police power to protect the health and welfare of its residents. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 83 S. Ct. 1210 (1963), upheld a state maturity test on avocados but

remanded the case (No. 45) to the district court for a new trial on the Commerce Clause contentions.[5]

In the present case, appellants concede that the imported beef is inspected both in country of origin and upon arrival in the United States, that the imported meat is healthful, wholesome and fit for human consumption. The record establishes that domestic beef of similar grade is also hard frozen and sold for identical use.

Chapter 150 is not in any way related to informing the consumer of the condition or purity of meat products purchased. Indeed, its sole purpose is to increase the cost and inconvenience of handling products made in whole or in part from imported meat with a view to eliminating them from the Oregon market.

The Oregon law is entirely different from regulatory measures sustained by this court in other cases. It is not a quarantine regulation which bespeaks the need for conforming to local conditions, *Minnesota Rate Cases (Simpson* v. *Shepard)*, 230 U. S. 352, 33 S. Ct. 729 (1913); it is not designed to eliminate deception of the public by mislabeling. *Hebe Co.* v. *Shaw,* 248 U. S. 297, 39 S. Ct. 125 (1919) (forbidding the sale in Ohio of condensed milk unless made from unadulterated milk); it is not a statute penalizing the sale of products with intent to defraud, *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 45 S. Ct. 141 (1925) (penalizing the sale with intent to defraud of preparations represented to be Kosher); it is not designed to prevent the spread of infectious disease, *Mintz* v. *Baldwin,* 289 U. S. 346, 53 S. Ct. 611 (1933) (New York statute requiring imported cattle to be accompanied by a certificate of health); it does not seek to regulate the size or standards of containers in which the product is sold, *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 56 S. Ct. 159 (1935) (regulating the standards of containers in which

[5] On remand the case was apparently dropped since no further reports have been located.

berries could be marketed); it is not designed to conserve food, *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, 56 S. Ct. 513 (1936) (restricting the processing of fish with the purpose of conserving it for food); it is not a statute requiring the registration of a product for ascertaining whether it is harmless, *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 57 S. Ct. 691 (1937) (cosmetic preparations); it is not a statute requiring the product to be inspected to insure that its label describes its chemical composition, *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345, 18 S. Ct. 862 (1898).

Chapter 150 represents a not too subtle legislative device designed to protect domestic and local products from import competition. The expenses necessarily resulting from compliance with the law and implementing regulations (Appendices A and B) constitute the equivalent of state enacted duties. The statutory provisions for labeling products produced, in part *from* imported manufacturing grade beef and domestic materials, along with requirements for posting of large signs over counters where, of many meats and meat products displayed, possibly only a few contain some imported meat, results in an effective burden designed to make difficult the sale of imported meat. As the lower Court stated, the administrative regulations confirm the true purpose of the statute.

We respectfully submit that appellants present no substantial question for the decision of this Court. The judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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Appendix A

[Chapter 150, Oregon Laws 1965]

AN ACT

Relating to foreign meat; and providing penalties.

Be It Enacted by the People of the State of Oregon:

Section 1. The purpose of sections 2 to 4 of this Act is to protect the consumers of this state in their choice of meat for consumption.

Section 2. No person shall sell or offer for sale at wholesale or retail, for consumption on the premises or otherwise, any fresh or frozen meat produced in a foreign country unless:

(a) There is displayed conspicuously upon the business premises a sign or signs indicating such meat is imported.

(b) Each package displayed for sale, each cut and each quarter, half and whole carcass of such meat is labeled or branded to indicate the country of origin.

Section 3. Persons selling meat described in section 2 of this Act shall keep accurate records of such sales and keep such records for one year and open for inspection by the State Department of Agriculture during regular business hours.

Section 4. (1) The State Department of Agriculture shall enforce sections 2 and 3 of this Act and the rules made under this section.

(2) The State Department of Agriculture shall by rule provide:

(a) The size, content and placement of signs, labels and brands required under section 2 of this Act.

(b) The content of records required under section 3 of this Act.

(3) No person shall violate any provision of a rule adopted under this section.

Section 5. Violation of any provision of sections 2 to 4 of this Act is a misdemeanor.

Appendix B

[State of Oregon, Department of Agriculture
Administrative Order A. D. 801 (8-65)]

Labeling of Foreign Meat

[Ed. Note: Unless otherwise specified sections 13-925 through 13-945 were adopted by the Department of Agriculture and filed with the Secretary of State, August 16, 1965, as Administrative Order 801 (8-65). Effective: September 15, 1965.]

13-925 Definitions. As used in Sections 13-925 to 13-945 of this order:

(1) "Foreign country" means any country or place except the fifty states of the United States, its territories or its possessions.

(2) "Imported meat" or "foreign meat" means meat produced in a foreign country and imported into the United States.

(3) "Meat" means the fresh, frozen, or frozen and thawed carcasses or parts of carcasses of any animal imported into the United States from a foreign country for human consumption. "Meat" includes also, but is not limited to, the fresh, frozen or thawed products made from such carcasses or parts thereof.

(4) "Package" means the box, carton, prepackaged wrapper or bag of any kind, or other receptacle, in which foreign meat is displayed, sold, offered for sale or held for sale. Package does not include:

(a) A can containing foreign meat.

(b) Foreign meat which is wrapped for the convenience of the customer at the time of sale and if each part or

piece of such meat is already labeled as required in Section 13-940 of this order.

(5) "Produced" means meat from an animal slaughtered in a foreign country.

13-930 Posting of Signs. (1) Each person as prescribed in subsection (a) of Section 2 of Chapter 150, Oregon Laws 1965 (HB 1797), and this includes, but is not limited to retailers, wholesalers and importers of foreign meat, and similar places where foreign meat is sold, offered for sale, or held for sale, shall conspicuously post a sign or signs on their premises containing the following wording:

(a) Foreign Meat Sold Here, (or)

(b) Imported Meat Sold Here.

(2) The lettering on such signs shall be at least four (4) inches in height, of heavy positive block style and of such a color (and in contrast to the background color, if any) as to be easily read by purchasers or the consuming public.

(a) In a retail store, at least one such sign shall be conspicuously posted near any area where foreign meat is sold. If this area is the meat market or counter in such store, there shall be at least one such sign for each 27 running feet of customer meat counter or display space.

(b) In other places, such as wholesalers or importers of foreign meat, at least one such sign shall appear in a location in the main office where it can and will be most conveniently read by the attending customers.

13-935 Labeling and Branding of Packages; Foreign Meat. (1) Each person, as prescribed in subsection (a) of Section 2 of Chapter 150, Oregon Laws 1965 (HB 1797), who displays packages in which foreign meat is sold, of-

fered for sale or held for sale, shall conspicuously label such packages with the following wording:

(a) IMPORTED FROM (name of the foreign country), (or)

(b) PRODUCED IN (name of the foreign country).

(2) The wording may be imprinted, printed or stamped on the package, or may be in the form of an insert if the wrapping is transparent. The label shall always appear on the top of the package if other wording, lettering or advertising appears on the top. Otherwise, the label shall be positioned or placed on the package and be of a type that can be easily read by the purchaser or consumer who views the produce prior to purchase. The wording or lettering shall be at least three-eighths (3/8) inches in height or not less than one-half (1/2) the size of the largest wording or lettering appearing on the package for other purposes, whichever is the larger. The wording or letter shall be of positive bold-faced type and of a color in contrast to the background color, if any.

(3) The provisions of this section apply to any package in which any part of the contents consists of foreign meat.

13-940 LABELING AND BRANDING OF CARCASSES OR PARTS THEREOF.

(1) Each person as prescribed in subsection (a) of Section 2 of Chapter 150, Oregon Laws 1965 (HB 1797), who displays, sells or holds for sale carcasses or parts thereof, of foreign meat, and if such meat is not contained in packages as provided in Section 13-935, above, or subject thereto, shall conspicuously and legibly imprint on each such carcass or part thereof the following wording:

(a) IMPORTED FROM (name of the foreign country), (or)

(b) PRODUCED IN (name of foreign country).

(2) The wording shall be stamped with meat stamping ink, or by use of a hot brand. The method used, which shall

have prior approval of the Department, shall be such that the wording will always be easily read by purchasers or consumers. The letters shall be at least three-eighths (3/8) inch in height of bold-faced type and of proper color to be in contrast to background color of the meat.

13-945 RECORDS TO BE MAINTAINED BY SELLERS OR PURCHASERS OF FOREIGN MEAT. (1) All persons subject to Chapter 150, Oregon Laws 1965 (HB 1797), including but not limited to persons who sell, offer for sale or hold for sale foreign meat, or persons who purchase and use such meat, shall maintain and keep for a period of at least one year, records which accurately show:

(a) The kind, amount and source (this includes the name and address of the person from whom the meat is purchased) of all foreign meat purchased each month.

(b) The kind, amount and destination (this includes the name and address of the person to whom such meat is sold) of foreign meat sold each month. Information need not be kept by a retailer of the names and addresses of consumers who purchase such meat.

(2) The previous records shall be maintained separately and conveniently so that inspectors or auditors from the Department may, with a minimum of delay, verify the above information or data. The Department may inspect or audit additional records of all persons subject thereto, which are necessary to verify the accuracy of the records set forth in subsection (1) of this section.